



## **FACTUAL HISTORY**

This case has previously been on appeal before the Board.<sup>3</sup> In a March 10, 2008 decision, the Board found that OWCP properly determined that appellant's position of a modified letter carrier, which she had held since October 28, 2006, represented her wage-earning capacity. However, the Board found that the case was not in posture regarding the rate of pay. The facts and history contained in the prior appeal are incorporated by reference. The record reflects that OWCP had accepted the claim for sprain of the hip and thigh, unspecified right, lumbosacral spondylosis without myelopathy and lumbosacral spondylosis.

In an April 14, 2008 decision, OWCP reaffirmed that appellant's actual earnings as a part-time, modified letter carrier fairly and reasonably represented her wage-earning capacity and amended the decision to reflect that at the time of the injury, she was a grade 02/Step C rather than a grade 01/Step C, which was originally used to determine her loss of wage-earning capacity (LWEC). It determined that the new computation rate each four weeks was \$1,213.00.

OWCP accepted appellant's claim for a recurrence on July 15, 2008, appellant at which time underwent refusion surgery and later on March 24, 2009 she underwent removal of instrumentation with reexploration on March 24, 2009. Appellant received compensation for temporary total disability and was thereafter placed on the periodic rolls.

In a September 4, 2009 report, Dr. Edward J. Goldberg, a treating Board-certified orthopedic surgeon, advised that appellant could return to work with restrictions. He noted that she should utilize a cane for ambulation, lift five pounds occasionally with her right hand and may sit, stand, walk up to one-half hour at any one time during the day. Dr. Goldberg indicated that appellant could not do any ladder climbing; only engage in ground work with no crouching, kneeling or squatting. He opined that she was at maximum medical improvement regarding the lumbar spine.

In an April 11, 2011 report, Dr. Goldberg updated appellant's work capacity to limit carrying to 10 pounds and noted that she could only carry with one hand as she used a cane.

Appellant participated in vocational rehabilitation. In a November 25, 2011 letter, OWCP advised her that the vocational rehabilitation counselor had determined that she was capable of performing the duties of a medical record coder, which was a sedentary position and that she would be provided 90 days of placement assistance. However, after 90 days of placement services, appellant did not secure a job. In a report dated February 22, 2012, the vocational rehabilitation counselor verified the availability of jobs in the market, completed a vocational assessment and closed the file.

OWCP proposed to reduce appellant's compensation, by notice dated May 24, 2012, noting that the medical and factual evidence in her case established that she was no longer totally disabled but partially disabled and now had the capacity to earn the wages of a medical record coder, Department of Labor, *Dictionary of Occupational Titles*, DOT #079.262-014, at the rate of \$864.00 per week. OWCP explained that the position was sedentary, with exerting up to

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<sup>3</sup> Docket No. 07-1634 (issued March 10, 2008).

10 pounds of force occasionally or a negligible amount of force frequently to lift, carry, push or otherwise move objects, including the human body.<sup>4</sup> It noted that the physical requirements did not exceed appellant's accepted work tolerance restrictions.

In a letter dated June 4, 2012, appellant indicated that she disagreed with the proposed reduction. She noted that her restriction was a five-pound lifting restriction and not a 10-pound lifting restriction. Appellant also requested medical treatment from a physician in Texas.

By decision dated July 11, 2012, OWCP reduced appellant's compensation entitlement effective July 29, 2012, based on her capacity to earn wages in the selected position of medical record coder. It further advised her that she was authorized to change physicians.

In an August 16, 2012 report, Dr. Stephen I. Esses, a Board-certified orthopedic surgeon, noted spondylolisthesis at L5-S1 and recommended a magnetic resonance imaging (MRI) scan of the lumbar spine. In a September 6, 2012 report, he noted that appellant had marked epidural fibrosis and no significant stenosis or disc herniation.<sup>5</sup>

In an August 23, 2012 letter, the employing establishment advised that appellant had been approved for administrative separation due to disability effective January 13, 2012.

In a September 21, 2012 report, Dr. Elias Benhamou, a Board-certified anesthesiologist, noted appellant's history and provided findings to include severe low back pain with radicular symptoms. He recommended epidural steroid injections and physical therapy. In a November 8, 2012 report, Dr. Benhamou diagnosed lumbosacral neuritis, postlaminectomy syndrome and lumbosacral spondylosis.

In a January 5, 2013 report, Dr. Mobeen Choudri, a physiatrist, noted that appellant was injured on January 2, 2004 when she slipped on some ice and fell onto her buttocks. He indicated that she underwent three lumbar spine surgeries with the last being performed in 2009. Dr. Choudri advised that appellant underwent physical therapy and lumbar epidural steroid injections to no avail. He diagnosed lumbar radiculitis/neuritis, lumbosacral spondylosis and lumbar postlaminectomy syndrome. Dr. Choudri opined that these diagnoses were due to appellant's January 2, 2004 work injury. He advised that the effects of the work injury had not ceased as she continued to have lower back pain with bilateral lower extremity radiation on a daily basis. Dr. Choudri indicated that appellant's complaints limited her ability to perform her activities of daily living and "prevented [appellant's] from maintaining any type of gainful employment at this time. Until her chronic pain is under control I do not believe that she is a candidate for any type of employment or work hardening programs." He noted requesting

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<sup>4</sup> Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs may be defined as sedentary when walking and standing are required only occasionally and all other sedentary criteria are met.

<sup>5</sup> OWCP received diagnostic reports that included a July 25, 2012 x-ray of the right knee, which revealed advanced osteoarthritis and an August 27, 2012 MRI scan of the lumbar spine that revealed a two millimeter annular disc bulge at L3-4, moderate facet hypertrophic changes and hypertrophic ligaments, a prosthetic disc with spinal fusion and hyperlordosis. Also received were laboratory reports; physical therapy notes, nurses' notes and a December 8, 2012 psychosocial assessment.

authorization for a trial of a spinal cord stimulator to treat her pain. Dr. Choudri recommended medication management until the spinal cord stimulator was approved. He opined that “[a]t this time I would consider [appellant] disabled and unable to perform any type of gainful employment.”

In a January 10, 2013 report, Dr. Sebastian Villarreal, a neurosurgeon, recommended epidural steroid injections. On January 25, 2013 appellant underwent an epidural steroid injection.

On January 29, 2013 OWCP issued a preliminary determination that appellant had received an overpayment of compensation in the amount of \$14,169.60. The overpayment occurred because her payment on the periodic rolls did not reflect the July 11, 2012 previous wage-earning capacity decision. OWCP found that appellant was at fault in the creation of the overpayment, as she accepted a payment she knew or should have known was incorrect. It further informed appellant that she had 30 days to request a telephone conference, a final decision based on the written evidence or a prerecoument hearing on the issues of fault and a possible waiver.

On January 31, 2013 OWCP received a request for reconsideration of the July 11, 2012 wage-earning capacity decision. Appellant also argued that her pay should not have been reduced and she was not responsible for an overpayment.

In a February 12, 2013 letter, appellant requested that her pay rate not be reduced. She explained that she recently had an epidural procedure due to the work injury and that she had permanent nerve and tissue damage and bulging discs that directly irritated the sciatic nerve. Appellant advised that she had constant pain down the length of the nerve and right ankle swelling, which hindered her walking abilities. She argued that her benefits should not have been reduced as OWCP was notified of her medical condition and her medical care was approved by OWCP, thus she could not take the blame for any overpayment. Appellant explained that she provided the reports from her physicians’ visits and OWCP was aware of her medical condition. She stated that the overpayment was not her fault. Appellant also argued that a reduction of pay should not have occurred. She provided an incomplete overpayment recovery questionnaire, only noting \$33.00 in social security benefits. Appellant noted that she had asked for help with medical assistance due to her health. She stated, “I know my body and knew I could not perform any type duty.” Appellant explained that she moved to a new area due to her health and it was hard to get medical care, but OWCP authorized everything in her file.

In a March 8, 2013 report, Dr. Villarreal diagnosed severe low back pain and right ankle pain. In a March 22, 2013 report, Dr. David J. Moeller, a Board-certified diagnostic radiologist, noted that an MRI scan of the lumbar spine revealed postoperative changes of the anterior interbody fusion at L5-S1 with bilateral laminectomy at L5. In an April 5, 2013 report, Dr. Choudri diagnosed lumbosacral neuritis, postlaminectomy syndrome, lumbosacral spondylosis and joint ankle pain. He recommended a spinal cord stimulator trial and treatment for depression.

The record reflects that the claimant elected OPM retirement benefits effective May 14, 2013.

By decision dated May 30, 2013, OWCP denied appellant's request for reconsideration of the July 11, 2012 wage-earning capacity decision. It found the new medical evidence not relevant to her ability to perform the constructed position of medical record coder.<sup>6</sup>

A prerecoupment hearing was held telephonically on June 17, 2013 as to the \$14,169.60 overpayment. Appellant stated that she had moved from Indiana to Texas and it took time to find a physician. She explained that a January epidural did not help her damaged sciatic nerve and inflamed tissues and she was limited with her activities. Appellant noted that OPM finally approved her disability with the same medical records in her file. She also indicated that she did not question that she was getting the same amount of money after she received the July 11, 2012 decision but assumed that OWCP had all the information about her condition as it approved her medical treatments. Appellant testified that she was only receiving \$33.00 from social security and approximately \$93.00 from workers' compensation, so she was living with her daughter. She was advised of the requirement to submit complete financial information with supportive documentation concerning monthly income and expenses, as well as any assets and that a waiver was only applicable if she was found without fault.

By decision dated September 6, 2013, OWCP finalized its finding that appellant received a \$14,169.60 overpayment of compensation for the period July 29, 2012 through January 12, 2013, based on her receipt of full-time compensation for disability after receiving a wage-earning capacity decision reducing her compensation benefits. It further found that she was at fault in creating the overpayment as she accepted a payment which she knew or should have known was incorrect.

### **LEGAL PRECEDENT -- ISSUE 1**

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>7</sup>

OWCP's procedures provide that, if a formal LWEC decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal LWEC.<sup>8</sup>

The procedures contained provisions regarding the modification of a formal LWEC. The relevant part provides that a formal LWEC will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. OWCP's procedures further provided that the party seeking modification of a formal LWEC decision has the burden to prove that one of these criteria has been met. If OWCP

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<sup>6</sup> See *supra* note 1.

<sup>7</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (October 2009); see Chapter 2.1501.3 (June 2013).

is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

OWCP accepted sprain of the hip and thigh, unspecified right, lumbosacral spondylosis without myelopathy and lumbosacral spondylosis. On April 14, 2008 it determined that appellant's duties of a part-time modified letter carrier fairly and reasonably reflected her wage-earning capacity. On July 11, 2012 OWCP reduced her compensation effective July 29, 2012, based upon her capacity to earn wages in the selected position of a medical record coder. Appellant did not appeal this decision to the Board.

The burden for modifying a wage-earning capacity is on the party attempting to show modification of the wage-earning capacity determination.<sup>10</sup> This includes the production of evidence in support of modification.<sup>11</sup> The Board finds that appellant has not met her burden to modify the July 11, 2012 wage-earning capacity determination.

On February 12, 2013 appellant noted that she sent a letter on June 4, 2012 requesting that her pay rate not be reduced due to her ongoing health issues and constant pain. She contended that she had a five-pound lifting restriction. Appellant also argued that a reduction of pay should not have occurred and that OWCP failed to consider whether the wage-earning capacity was reasonable. She referred to 5 U.S.C. § 8115(a).<sup>12</sup> Appellant indicated that her age, medical restrictions and lack of experience were not properly considered.

However, the Board notes that the vocational rehabilitation counselor utilized the September 4, 2009 and April 11, 2011 reports of appellant's physician, Dr. Goldberg, who provided restrictions consistent with the duties of a medical record coder. Dr. Goldberg initially provided a 5-pound restriction of occasional lifting but, on April 11, 2011, advised that appellant could carry 10 pounds. On November 25, 2011 OWCP advised her that the vocational rehabilitation counselor found that she met the requirements of a medical record coder, which was a sedentary position. In a report dated February 22, 2012, the vocational rehabilitation counselor verified the availability of jobs in the market. In determining an employee's wage-earning capacity based on a constructed position OWCP must determine whether the position is

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<sup>9</sup> *Id.*

<sup>10</sup> *Stanley B. Plotkin*, 51 ECAB 700 (2000).

<sup>11</sup> *Id.*

<sup>12</sup> Section 8115(a) of FECA provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings, if his or her actual earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings of the employee do not fairly and reasonably represent his or her wage-earning capacity or if the employee has no actual earnings, his or her wage-earning capacity as appears reasonable under the circumstances is determined with, due regard to the nature of his or her injury, the degree of physical impairment, his or her usual employment, his or her age, his or her qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his or her wage-earning capacity in his or her disabled condition.

vocationally suitable, taking into account the employee's education, age and prior experience.<sup>13</sup> Because a rehabilitation counselor or specialist is an expert in the field of vocational rehabilitation, OWCP may rely on his or her opinion as to whether a job was reasonably available.<sup>14</sup> Thus, the record does not show that the July 11, 2012 rating was in error.

Appellant provided a January 5, 2013 report from Dr. Choudri, who diagnosed lumbar radiculitis/neuritis, lumbosacral spondylosis and lumbar postlaminectomy syndrome and opined that all of these diagnoses were work related. Dr. Choudri advised that the effects of the work injury had not ceased as she continued to have low back pain with radiation to the legs on a daily basis. He indicated that appellant's complaints "prevented her from maintaining any type of gainful employment at this time." Dr. Choudri indicated that, until her chronic pain was under control, he did not believe that she was a candidate for any type of employment or work hardening programs. He opined that "[a]t this time I would consider [appellant's] disabled and unable to perform any type of gainful employment." However, the Board notes that Dr. Choudri did not provide any examination findings or provide reasoning to explain how her condition had worsened such that she was no longer able to meet the restrictions of the constructed position. Appellant therefore did not meet her burden to modify the July 11, 2012 wage-earning capacity determination on the grounds that her injury-related condition had materially changed. She provided no other current medical evidence supporting that she was unable to work in the selected position.

On appeal, appellant argued that Dr. Goldberg gave her a five-pound lifting restriction. However, on April 11, 2011, he noted that she could carry up to 10 pounds.

Appellant may request modification of the LWEC determination, supported by new evidence or argument, at any time before OWCP.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>15</sup> Section 8129(a) of FECA provides, in pertinent part, when an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.<sup>16</sup>

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<sup>13</sup> 20 C.F.R. § 10.403.

<sup>14</sup> *Supra* note 8 at Chapter 2.814.11 (October 2009).

<sup>15</sup> 5 U.S.C. § 8102.

<sup>16</sup> *Id.* at § 8129(a).

OWCP's regulations provide that compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.<sup>17</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that appellant received an overpayment of compensation in the amount of \$14,169.60. The record supports and appellant has not disputed, that she continued to receive compensation after OWCP reduced her compensation on July 11, 2012, based upon her capacity to earn wages in the constructed position of a medical record coder.

The record documents that appellant was paid \$14,980.08 in compensation between July 29, 2012 and January 12, 2013. The evidence further shows that, due to the March 20, 2002 wage-earning capacity decision, she was only entitled to receive \$810.48 for this period. The difference represents an overpayment of \$14,169.60. The record establishes that appellant received a \$14,169.60 overpayment of compensation. As appellant was not entitled to compensation after her compensation was reduced on July 11, 2012, OWCP properly found an overpayment of compensation in the amount of \$14,169.60.

### **LEGAL PRECEDENT -- ISSUE 3**

Under section 8129 of FECA and its implementing regulations, an overpayment must be recovered unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.<sup>18</sup> Section 10.433 of the implementing regulations provide that OWCP may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.<sup>19</sup> The regulations further provide that each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper.<sup>20</sup> Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if he or she accepted a payment which he or she knew or should have known to be incorrect.<sup>21</sup> Whether OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.<sup>22</sup> The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.<sup>23</sup>

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<sup>17</sup> 20 C.F.R. § 10.500(a).

<sup>18</sup> *Id.* at § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

<sup>19</sup> *Id.* at § 10.433(a).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at § 10.433(a)(3).

<sup>22</sup> *Id.* at § 10.433(b).

<sup>23</sup> *Id.* at § 10.433(c).

### ANALYSIS -- ISSUE 3

OWCP found appellant at fault in the creation of the \$14,169.60 overpayment because she accepted payments which she knew or should have known to be incorrect. It properly determined that she was at fault in the creation of the overpayment.

Appellant received \$14,980.08 in compensation between July 29, 2012 and January 12, 2013 but was only entitled to receive \$810.48 for this period. She argued that her compensation should not have been reduced, that OWCP was aware of her medical condition and continued to approve medical care such that she was not to blame for the overpayment. The Board notes that the record contains a July 11, 2012 final decision informing appellant of the specific details of the reduction of her compensation effective July 29, 2012. The decision contained attached appeal rights and was mailed to her address of record. Appellant's contention that she was not aware of the reduction of her compensation being reduced effective July 29, 2012 is without merit. She received disability compensation at the higher rate after July 29, 2012 and knew or should have known that this was incorrect. OWCP mistakenly failed to reduce her compensation in accordance with its July 11, 2012 decision. Even though it may have been negligent in continuing to issue wage loss for total disability after it reduced appellant's compensation due to a constructed wage-earning capacity determination, this does not excuse her acceptance of such checks which she knew or should have been expected to know were incorrect.<sup>24</sup> Given the amount of compensation appellant received to which she was not entitled, as she was informed that her compensation would be reduced 91 percent, as well the lengthy period in which she received these payments, she accepted payments between July 29, 2012 and January 12, 2013, which she knew or should have known were incorrect. Because she was at fault in creating the overpayment, OWCP properly found that she is not entitled to waiver of recovery.<sup>25</sup>

### CONCLUSION

The Board finds that appellant did not establish that modification of the wage-earning capacity decision was warranted. The Board also finds that she received an overpayment of compensation in the amount of \$14,169.60 for the period July 29, 2012 through January 12, 2013; and she was at fault in the creation of the overpayment.

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<sup>24</sup> *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

<sup>25</sup> The Board does not have jurisdiction to review the recovery of the overpayment. The Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA. See 20 C.F.R. § 10.441(a); *L.C.*, 59 ECAB 569 n.24 (2008) citing *Ronald E. Ogden*, 56 ECAB 278 (2005).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 6 and May 30, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 3, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board